No. 82-660

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HARRISON CRONIC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AND THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICI CURIAE* SUPPORTING RESPONDENT

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No. 82-660

In the Supreme Court of the United States

October Term, 1983

United States of America,
Petitioner

v.

Harrison Cronic, Respondent

On writ of certiorari to the United States Court of Appeals for the Tenth Circuit

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Interest of Amici

The National Legal Aid and Defender Association (NLADA) is the sole national voice for the overwhelming majority of public defenders, private attorneys and defender clients who make up its defender membership. Representing nearly 600 member public defender offices and about

7,000 individual defenders, NLADA has spoken out on national issues of concern to the legally indigent and their attorneys in both civil and criminal courts since 1911.

The Association of Trial Lawyers of America (ATLA), founded 38 years ago, is a voluntary national bar association with a membership exceeding 50,000 advocates, of whom approximately 5,000, constituting the Criminal Law Section, regularly appear in both state and federal courts in defense of those accused of crime. The men and women of the Association are dedicated to the preservation of the American legal system, the protection of individual rights and liberties, and the evolution of the common law.

ATLA, through its appropriate officers and committees, has authorized

its participation in this case as Amicus Curiae. ATLA is vitally concerned with this appeal, not only for the instant case, but also for the effect the decision in this case will have on similar cases now pending throughout the country, as well as for its impact on constitutional doctrine.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members, founded in 1920, dedicated to preserving and defending fundamental liberties embodied in the Constitution. The ACLU has frequently appeared in this Court to defend the Sixth Amendment's right to counsel, which is indispensable to preservation of other due process rights.

Amici have obtained the written consent of the parties to file a brief in this case.

SUMMARY OF ARGUMENT

Harrison Cronic was denied the effective assistance of counsel guaranteed by the Fifth and Sixth Amendments because unfair impediments created by the Government prevented his attorney from rendering competent representation. Because those impediments were not of his own making, and because Mr. Cronic should not be now put to the burden of proving his likely innocence based on a trial record which is inherently suspect due to his lawyer's action or inaction, his conviction must now be reversed for a new trial with the adequate assistance of counsel.

Amici urge the Court to adopt a test recognizing that counsel may be constitutionally ineffective in two very different ways, one suggested by the Fifth

and Fourteenth Amendment "due process" clauses and one by the Sixth Amendment's "assistance of counsel" provision. Under this test, the defendant is deprived of the effective assistance of counsel when counsel either is unfairly impaired by external or systemic restraints, or fails to exercise "the skill, judgment and diligence of a reasonably competent defense counsel." United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982)

When the reviewing court finds that the attorney has been unduly restricted by systemic or "structural" impairments, a reversal of the conviction should ordinarily follow, as neither the defendant or his counsel can be faulted for the failure of the State to provide a funda-

mentally fair proceeding, and allocation of prejudice would be entirely speculative and conjectural.

Where, however, the failure lies substantially within the attorney's personal control; i.e., his or her errors relate to "skill, diligence and judgment," the inquiry is necessarily subjective. To lend more objectivity to an inquiry into the quality of counsel's performance, the court should adopt specific practice criteria against which counsel's performance can be judged. When these criteria have been substantially complied with, the trial or reviewing court may rest assured that the defendant's conviction was fairly obtained, at least as to ade-quacy of counsel. Where there is a significant shortcoming in these standards, however, the government

carries a heavy burden to demonstrate why the conviction should not be reversed.

ARGUMENT

BECAUSE UNFAIR IMPAIRMENTS CREATED BY THE GOVERNMENT PREVENTED RESPONDENT'S COUNSEL AT TRIAL FROM RENDERING THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, RESPONDENT'S CONVICTION MUST BE REVERSED WITHOUT THE NECESSITY OF DEMONSTRATION OF PREJUDICE.

I

THIS COURT'S LONG RECOGNITION OF THE INDISPENSIBLE IMPORTANCE OF THE EFFECTIVE ASSISTANCE OF DEFENSE COUNSEL TO THE ADVERSARY PROCESS REQUIRES ITS STRONG GUIDANCE IN SETTING CLEAR STANDARDS FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE ON DIRECT REVIEW OR COLLATERAL ATTACK.

The history of the Court's decisions demonstrates a growing and now firmly established principle that counsel is an indispensable adjunct to fairness in a criminal trial. Counsel, it may be said, is the sine qua non of all other procedural rights. The Government's assertion that the right to counsel "supplements" other Sixth Amendment rights (Brief for

the United States, at 25) is disingenuous, and belittles a strong history establishing counsel as the cornerstone of the adversary system.

As early as Powell v. Alabama, nearly fifty years ago, this Court eloquently gave voice to the need for counsel's "guiding hand":

> The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skills and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.
>
> Powell v. Alabama, 287 U.S. 45, 68-69 (1938)

Powell, of course, relied on the Due Process clause to find a denial of fundamental fairness to nine illiterate black youths, the "Scottsboro Boys," accused of capital rape. Undeniably, the young men had "counsel" at their trial. The Court found that the circumstances leading up to counsel's performance in trial, however, were such as to create an insurmountable impediment to fairness. Id. at 56, 69.

In Gideon v. Wainwright, 372 U.S. 335 (1963) the Court found that defense counsel was as much a necessity as prosecutors in state felony proceedings:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged

> with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.
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> Id. at 344.

These and many other decisions of this Court demonstrate that competent counsel is the bulwark of the adversary system.[1] In fact, the adversary system presumes attorney competence, and the failure to provide competent counsel to both sides in a criminal trial threatens

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[1] See, e.g., Argersinger v. Hamlin, 407 U.S. 25 (1972); Douglas v. California, 372 U.S. 353 (1963); In re Gault, 387 U.S. 1 (1967).

the structure of our system. See Damaska, "Presentation of Evidence and Factfinding Precision," 123 U.Pa.L.Rev. 1083, 1091 (1975). Further, beyond preserving the institutional integrity of the system, society has an interest in guaranteeing the accuracy of results of criminal trials. If society did not care so fervently about fairness, it could as easily turn to the inquisitional model to find the "obviously" guilty. Because of this concern for fairness, this Court must speak firmly and clearly to courts below to guarantee the maintenance of adequate counsel for rich and poor alike. Former Justice Schaefer of the Illinois Supreme Court summarized our justifiable reliance on the right to counsel as the cornerstone of justice when he said, "Of all the rights that an accused person has,

the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, "Federalism and State Criminal Procedure," 70 Harv.L.Rev. 1, 8 (1956).

More practical law school training, continuing legal education programs, specialization and certification may, in the long run, help to alleviate much of the problem of attorney competence. See, e.g., ABA Section of Legal Education and Admission to the Bar, Final Report, Task Force on Lawyer Competency: The Role of Law Schools (1979); ALI-ABA Committee on Continuing Professional Education, A Model Peer Review System (Discussion Draft, 1980); Final Report of the Task Force on Professional Competence (ABA, July 1983). Each of these tasks, however,

is long-term and requires investment of immense resources.

The provision of money damage remedies to the defendant, either through a malpractice or civil rights action, provides no viable deterrent to lawyer ineffectiveness for several reasons. First, and most important, these remedies do not provide what the Constitution guarantees: the opportunity for vindication in a full and fair hearing. Second, law and experience greatly restrict these remedies. Civil rights actions under 42 U.S.C. Sec. 1983, are impossible since this Court has held that neither the private attorney, appointed counsel or public defender acts "under color of state law," for jurisdictional purposes, while performing his or her duties as "personal counselor and advocate" for the accused. Polk County v.

Dodson, 454 U.S. 312, 318 (1981)[2] In malpractice actions, the painful fact is that while the appointed lawyer is not immune from suit, Ferri v. Ackerman, 444 U.S. 1983 (1979), such suits are almost impossible to bring without the help of an attorney, and are difficult to prevail in, due to the hostility of judges and juries.[3]

Finally, attorney disciplinary proceedings suffer from the same

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[2] This term, the court will review the question of whether the public defender, like prosecutors and judges, should be afforded immunity under 42 U.S.C. 1983, when a conspiracy with government officials is alleged. Tower v. Glover, No. 82-1988, Cert. granted Oct. 3, 1983.

[3] Records available to the NLADA reveal only one malpractice suit brought against a public defender in St. Louis on grounds of ineffective assistance, which was ultimately settled. "New Worry for Public Defenders," St. Louis Post-Dispatch, 1, 8 (Jan. 9, 1983)

shortcomings as the damage remedy. They come too late and they do nothing to help the party most aggrieved: the wrongly convicted defendant. They are virtually of nonexistent in situations in which the defendant's conviction is upheld on appeal.

Thus, however imperfect direct or collateral review may be, and however inexact the standard for review, this remedy is the only effective means of correcting wrongs occasioned by counsel's ineffectiveness.

Articulation of the standard for effectiveness of counsel has progressively moved from one requiring reduction of the proceedings to a "farce or sham" before reversal is justified to one which may be summarized as requiring

"reasonably competent counsel."[4] Courts and commentators have struggled to discover whether this change in the wording of the standard has been followed by a change in the number of convictions attacked or reversed. Some suggest that these generalized standards are no more than a "semantic merry-go-round," a change in form only. See United States v. Decoster ("Decoster III"), 624 F.2d 196, 206 (D.C. Cir. 1979), quoting Cooper v. Fitzharris, 557 F.2d 1162, 1166 (9th Cir. 1977) (Duniway, J., concurring). Others suggest that the "more stringent 'reasonably competent' test" was in fact

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[4] A detailed description of the Circuits' transition from "farce and mockery" to "reasonable competence" standard is adequately compilated and described in the Brief for the United States, at 32-33 and Appendix B, and will not be reiterated here.

applied even while courts continued to formally adhere to the "farce and mockery" standard. See Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980).

In an effort to discover how the standard has been applied in fact, the National Legal Aid and Defender Association[5] conducted research specifically for the Amicus brief in this case. A computer and library sample of reported state and federal appellate decisions was collected for the period between 1970, the date of this Court's decision in McMann v. Richardson, 397 U.S. 759 (1970), and July of 1983. Our sample included reported decisions of the U.S. Circuit Courts of Appeal, as well as all state appellate

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5 Assisted by funding from the ABA's Bar Information Project of the Standing Committee on Legal Aid and Indigent Defendants.

courts, both intermediate and final. For purposes of examining the question of "systemic" or "personal" ineffectiveness,[6] we excluded those cases reviewing ineffectiveness on grounds of a purported conflict of interest. We did not individually review all decisions in which an issue of ineffectiveness of counsel was raised. We did review and catalog all cases in our case sample.[7] The

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[6] "Systemic" and "personal" ineffectiveness refer to the distinction between counsel's ineffectiveness allegedly caused by external impairment, and ineffectiveness resulting from counsel's "untrammelled and unimpaired" performance. Cf., United States v. Decoster, supra 624 F.2d at 202.

[7] We have included as Appendix A all cases in which relief was granted by the reviewing court on grounds of ineffective assistance of counsel; i.e., reversal and remand for a new trial, grant of a writ, etc. We did not pursue the appellate cases in which relief was granted back to the trial courts. Thus, no data is reported here on reconviction rates, dismissal or acquittal at retrial.

results of our examination are both revealing and disturbing.

The computer reports that between 1970 and July of 1983, a total of 8,460 reported decisions were rendered in the Federal and State courts of review in which an issue regarding "personal" or "systemic" (i.e., "non-conflict-of-interest") ineffectiveness was raised.[8] Of those cases, we individually reviewed a sample of 4,403, or approximately 52%. Our sample was keyed to all cases in which the computer indicated that counsel had

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[8] Of these decisions, 1,996 were in federal courts of review, while 6,464 were decided in state courts, both in intermediate and high.

been appointed or assigned, whether public defender or private counsel.[9]

From the original sample of 4,403, our individual review included a "cleaning" of the computer data to eliminate erroneous citations, cases not on point, limited remands, etc. This reduced our sample by about 10% to approximately 4,000.

Of the 4,000 remaining appellate decisions, only 159, or 3.9%, resulted in a grant of relief to the defendant on grounds of ineffectiveness of counsel. Such a small number, might be considered "statistically insignificant."

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[9] Disparities between the percentage of appeals here reported involving assigned counsel and reported indigency rates, infra, p. 9, are explained easily by very high guilty plea rates for appointed counsel. Such cases seldom result in appellate review. See, NLADA The Other Face of Justice, supra at 30, Table 44.

To further study the impact of the change in the standard, we studied distribution of the cases by the year of their decision, to determine purportedly if the "evolving" standard resulted in more reversals in more recent years.

Yearly breakdown of the decisions is as follows:

Figure 1

Appellate Decisions Where Relief Granted on Ineffectiveness of Counsel Grounds, By Year.

Year	No. of Cases
1970	7
1971	6
1972	6
1973	8
1974	11
1975	9
1976	13
1977	13
1978	15
1979	13

Appellate Decisions Where Relief Granted on Ineffectiveness of Counsel Grounds, By Year. (Cont'd.)

Year	No. of Cases
1980	17
1981	11
1982	19
1983 (to 7/1)	11
TOTAL	159

While a slight increase has occurred in the incidence of reversals over the past 13 years, the increase is insignificant, given the small number of cases each year as a percentage of all reported appellate decisions.

Without further analysis, however, a number of conclusions can be drawn from the data presented. First, and most important, there is no evidence that adoption of a "more stringent" test requiring "reasonable competence" of

counsel has or will result in an "opening of the floodgates" on appeal. The evidence shows that the claim is both infrequently raised[10] and rarely successful.[11] This court has the opportunity to provide leadership and guidance to the lower courts in their proper articulation and application of the standard.

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[10] The 8,460 total cases in which the claim was raised from 1970 to 1983 must be compared to an annual average number of criminal appeals in the federal courts of appeal alone of approximately 4,425 cases nationally between 1971 and 1980. Bureau of Justice Statistics, 1981 Sourcebook of Criminal Justice Statistics Table 5.22 (1982). This translates to nearly 60,000 federal cases during the period of our survey. Thus, claims of ineffectiveness occurred in less than 3.3% of all federal criminal appeals during the period studied.

[11] In his insightful analysis of the issue, Judge Bazelon bluntly concludes: "One of the major reasons that the problem of ineffective assistance has remained hidden is the appellate court's remarkable propensity to ignore the issue of ineffective assistance and to paper over the cracks in the house that Gideon built." Bazelon, "The Defective Assistance of Counsel," 42 U. Cin. L. Rev. 1, 21 (1973).

Second, the lack of any real difference in outcomes due to a new and purportedly more strict standard means that the "new" standard has not accomplished that which it seeks - to raise the quality of advocacy so as to more nearly approximate due process and equal justice in our nation's courts. This is because the "new" standard is no less subjective than

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(Footnote 11 Cont'd.)

Judge Bazelon suggests this "papering over" of cases occurs because of real or imagined concerns that: (1) if courts reversed all convictions where it was proper on this ground, "half the convictions" would be remanded; (2) if reversals occurred, there would not be enough competent lawyers to handle the defense of the indigent; (3) if the lawyers were competent in the first place, the system would grind to a halt; (4) the reviewing court may unnecessarily "soil" the reputation of the attorney who is found to be ineffective; or (5) most criminal defendants are guilty anyway. Id. at 23-27. The article explains why each of these factors is either erroneous or irrelevant to the decision of the reviewing court.

the "old." The only remedy is the adoption of more specific and objective criteria, as is proposed below.

Third, a closer review of these cases reveals that the errors of counsel were very frequently occasioned by a systemic impairment or restraint which worked to unfairly inhibit or even nullify representation by counsel, although counsel was "bodily" in the courtroom, totally apart from counsel's personal skills or abilities.[12] Several instances of this sort were discovered in our review of these cases, and their relationship to the case at bar should be immediately apparent.

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12 Our rough and unscientific count of such instances identified 111 of the 159 case sample as real or possible cases of "systemic failure in adequacy of representation."

In Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973), the defendant had been charged in Georgia with seven counts of burglary, three counts of theft by taking and one count of carrying an unlicensed pistol. Six days after his arrest, he appeared with appointed counsel and pled guilty to all charges, receiving a sentence of three years for each of the ten charges, the sentences to be served consecutively, for a total of thirty years imprisonment. On the one remaining charge, Walker received a six month concurrent sentence. Id. at 214.

The Court of Appeals ordered issuance of a writ of habeas corpus on grounds that Mr. Walker had been denied effective assistance of counsel. Among its findings on appeal was the fact that

the attorney who represented Walker worked in an office adjoining the courtroom, that the attorney handled roughly ninety percent of the appointed cases in the court, without fee, and that the lawyer represented about 500 defendants each year, averaging about ten cases each "plea day."

The lawyer for Walker testified that his usual practice was to talk to each client for ten to thirty minutes on an average plea day. It was admitted that he had not investigated the facts in this case, talked to any witnesses, explored any motions or engaged in any plea bargaining. The lawyer testified that he follows a "substantially different practice" when representing fee clients rather than appointed clients. The de-

fendant was illiterate, and his pleas of guilty were signed by his attorney. Id. at 215.

Noting each of these factors, the Court of Appeals overturned the convictions, relying on the language of this court in Von Moltke v. Gillies, 232 U.S. 708 (1948), when the court said, "we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner." Von Moltke v. Gillies, supra, 232 U.S. at 723. That is to say, in Walker, as in Von Moltke, Powell v. Alabama, and the case at bar, a lawyer was in the courtroom with the defendant, but was only a "token."

In Washington v. Maroney, 428 F.2d 10 (3d Cir. 1970) the Court of Appeals overturned a Pennsylvania conviction of armed robbery and burglary, for which consecutive sentences of ten to twenty and two and one-half to five years imprisonment were imposed, respectively, after a bench trial. The basis for reversal was the conduct of the case by an attorney with the Allegheny County Legal Aid Society.

Although interviewed by a social worker from the Society who visited him in jail to determine his eligibility for services, the defendant did not see his attorney until the day of his trial, thirteen days later. The defendant testified that he saw his attorney for about "one moment" before the trial began, while his attorney said he did not recall the defen-

dant or the case at all. Id. at 12. Indicating that there was "no indication in the record of any preparation whatsoever by the attorney," Id. at 13, the Court of Appeals remanded for issuance of the writ of habeas corpus, holding that the defendant "did not have the vigorous representation which one expects in the usual adversary proceeding..." Id. at 14.

In both Walker and Washington, as in many of the other cases discovered in this review of reversals,[13] there was a common

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13 Other examples include State v. Pelfrey, 256 S.E. 2d (W.Va. 1979) (appointed counsel failed to move for mistrial, despite belief that error had occurred, due solely to economic disincentive to try the case again); State v. Marrero, 155 N.J. Super. 567 (1978) (assistant public defender failed to seek pre-trial intervention and diversion for defendant, despite the fact that another public defender in the same office had successfully moved for

theme which emerged. In each case, the reviewing court put great emphasis on the fact that the inadequacies in representation related as much to the structure or system in which the derelictions occurred as to the personal actions or inactions of the attorney appointed. In each case, the courts found that, although a lawyer was present in the courtroom, this impairment or restraint resulted in a denial of effective assistance of counsel requiring reversal of the conviction.

(Footnote 13 Cont'd.)

diversion of this defendant on this charge after his conviction, without knowledge of other public defender's actions); Blankenship v. Commonwealth, 554 S.W. 2d 898 (Ky. App. 1977) (public defender "system" failed to file transcript for defendant, resulting in dismissal of appeal); People v. Gonzalez, 43 App. Div. 2d 914 (N.Y. 1974) (new attorney from Legal Aid Society, assigned at sentencing, knew nothing about case and did not assist defendant at

II

IN ORDER TO ESTABLISH A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL, THE DEFENDANT MAY DEMONSTRATE EITHER THAT COUNSEL SUFFERED FROM AN UNFAIR SYSTEMIC IMPAIRMENT WHICH SO HINDERED REPRESENTATION AS TO NULLIFY THE PRESENCE OF COUNSEL, OR THAT COUNSEL'S ACTION FAILED TO SHOW THE SKILL, JUDGMENT AND DILIGENCE OF A REASONABLY COMPETENT DEFENSE COUNSEL.

In its brief, the Government relies totally on an "error-based" analysis of the issue of ineffectiveness. (Brief for the United States, at 15 et seq.). This analysis unduly restricts the inquiry of the Court, and fails to acknowledge the development of the right to effective assistance of counsel in Fifth, Sixth and

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(Footnote 13 Cont'd.)

sentencing stage); State v. Jackson, 534 P.2d 281 (Ariz. App. 1975) (new public defender appearing on day of trial because of unavailability of deputy who had been assigned case and had prepared it for trial, was ineffective in trial representation); Williams v. Twomey, 570 F.2d 634 (7th Cir. 1974) (same fact pattern as State v. Jackson, supra).

Fourteenth Amendment contexts. Moreover, the requirement that the defendant identify specific and significant errors ignores precedent of this Court to the contrary and constitutes a highly subjective test for ineffectiveness of counsel which the Court should reject.

That the law of ineffectiveness of counsel finds it roots in both the Fourteenth and Sixth Amendments to the Constitution has already been demonstrated. Supra, at 10 - 12. By following the development of the caselaw under the Fourteenth Amendment, which requires an ad hoc inquiry into the fundamental fairness of the proceedings due to the alleged failings of counsel, it is readily apparent that the focus of the due process inquiry lies on the systemic impairment

of counsel which actually or effectively "removes the guiding hand" from the proceedings. This occurs when counsel is either totally absent, or is barred from the opportunity to appear or function in the traditional advocacy role as counsel. See, Ferguson v. Georgia, 365 U.S. 570 (1961) (prohibition against direct examination of the defendant); Hamilton v. Alabama, 368 U.S. 52 (1961) (denial of counsel at arraignment); Brooks v. Tennessee, 406 U.S. 605 (1972) (requirement that defendant be first defense witness); Herring v. New York, 422 U.S. 853 (1975) (denial of right to summation in non-jury case); Geders v. United States, 425 U.S. 80 (1976) (prohibition against consultation with defendant during overnight recess).

In each of these situations, the Court has reversed the conviction without the requirement of any specific showing of prejudice, due to the fact that the defendants were deprived of counsel at a critical point in the proceedings.[14]

Amici urge the adoption of a test for ineffectiveness of counsel which recognizes this line of authority as well, and under which no showing of prejudice is required. Under the due process "prong" of the test, the initial inquiry of the court must be whether counsel was substantially impaired, by factors outside of his or her control, from rendering effective assistance of counsel thereby

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[14] Our analysis of these cases does not differ in this respect from that of the Solicitor General. Brief for the United States, at pp. 27-29.

inhibiting a full and fair development of facts and law. If so, the conviction must be reversed without inquiry into prejudice, since such an inquiry would be futile.

This test is implicitly recognized by both the Government in its brief and the Tenth Circuit in its decision below.

The Solicitor General premises the entire argument of the Government on the assertion that:

> A number of considerations pertaining to the nature and purposes of an inquiry into counsel's performance at trial strongly suggest that where counsel was unfettered by external restraints on his ability to fulfill a lawyer's traditional role, a court may set aside a conviction on the basis of assertedly ineffective assistance of counsel only upon a showing of serious errors that substantially prejudiced the accused or fundamentally undermined the fairness of the proceedings.
>
> Brief for the United States, at 16. (Emphasis added)

Thus, while asserting that prejudice may have to be shown in some cases, the Government acknowledges an exception from its proposed test when "external restraints" occur.

The test proposed here is exactly that which was applied by the court of appeals in its decision below. In citing to United States v. Golub, 638 F.2d 185 (10th Cir. 1980) the court referred to instances in which "circumstances hamper a given lawyer's preparation of a defendant's cases." United States v. Cronic, supra, 1126 F.2d at 1128. In enumerating the circumstances articulated in King and Golub,[15] the court was stating nothing

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[15] These include "(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel." United States v. Cronic, supra, 675 F.2d at 1129.

more than the fact that these circumstances, taken in their cumulative impact in this case,[16] can and did effectively bar the defendant's attorney from performance of his functions as an advocate, thereby depriving defendant of counsel at a critical stage in the proceedings. This Court, too, should adopt this test, find that it was not met in this case, and affirm the decision of the court of appeals.

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[16] The Solicitor's seriatim discussion of the various factors involved in the result reached by the court of appeals is a classic example of "divide and conquer" strategy. Brief for the United States, at 35-44. Cases cited as to each individual circumstance may be accurate, but no authority cited speaks to the cumulative impact of these circumstances.

III

MINIMUM OBJECTIVE STANDARDS MUST BE ADOPTED TO MEASURE COUNSEL'S FAILURE TO ACT AS REASONABLY COMPETENT COUNSEL, AND THE PROSECUTION MUST BEAR THE BURDEN OF PROOF, IF PREJUDICE ENTERS INTO THE CALCULUS OF COUNSEL'S EFFECTIVENESS.

If this Court also applies a Sixth Amendment test suggesting that counsel must exercise "the skill, judgment and diligence of a reasonably competent defense attorney," Amici would urge the Court to apply more objective criteria against which to measure counsel's performance than the test itself suggests.[17]

Commentators and courts have increasingly given voice to the fact that

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[17] These objective criteria should also be adopted even if this court requires proof of "serious derelictions" by counsel, as the government suggests. Brief for the United States, at 16. The prosecution's test is certainly no less subjective than that of the court of appeals, and will give precious little guidance to courts below as to its practical application.

more clear and specific standards are needed to measure counsel's performance. Many, if not most, suggest that the American Bar Association's Standards for Criminal Justice are an appropriate starting point. The Standards are described as "comprehensive, realistic, and amendable." Goldblatt, "Ineffective Assistance of Counsel: Attempts to Establish Minimum Standards," The Defense Counsel, 221-247 (McDonald ed. 1983). See also, Alpert and Huff, "Defending the Accused: Counsel Effectiveness and Strategies," The Defense Counsel, 247, 248, 267 (McDonald ed. 1983); Erickson, "Standards of Competency for Defense Counsel in a Criminal Case," 17 Am.Crim.L.Rev. 233-251 (1979); Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death

Penalty Cases" 58 N.Y.U.L.Rev. 299, 339-345, 362 (1983); Lasater, "The Role of Harm in Ineffectiveness of Counsel Cases: Practice and Policy," 32 Syracuse L. Rev, 759, 790-800 (1981); Joint Committee on Judicial Administration, "District of Columbia Criminal Justice Act Plan," The Daily Washington Law Reporter, 994-997, Section 10 (May 21, 1981).

The guidelines enumerated by Colorado Supreme Court Justice Erickson in his article capture the basic duties of counsel in a clear and articulate fashion:

1. Counsel must diligently and actively participate in the full and effective preparation of his client's case.

2. Counsel has a duty to investigate clearly all defenses of fact and of law that may be available to the defendant.

3. Counsel must confer with his client without undue delay and as often as necessary to elicit matters pertinent to his defense.

4. Counsel should promptly advise his client of his rights and take all actions necessary to preserve them.

5. Counsel should be concerned with the accused's right to be released from custody pending trial, and be prepared, when appropriate, to make motions

for a pre-trial psychiatric examination or the suppression of evidence.

Erickson, supra, 17 Am. Crim.L.Rev. at 245.

These guidelines would give specificity to the expectations of counsel while leaving the necessary flexibility to allow for the exercise of judicial discretion in the determination of whether substantial compliance with the guidelines has occurred on the facts of the case.

In the event that compliance with any of the tests proposed in this Court has not occurred, and the Court determines that counsel has not performed in an effective fashion, the decisions of the Court make clear that the prosecution, not the defense, bears the burden of demonstrating the absence of prejudice to the defendant.

Chapman v. California, 386 U.S. 18 (1967) makes clear that there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," and refers directly to the right to counsel. Id. at 23, n. 8. However, even if the rule of prejudice demonstration is to be applied, Chapman unequivocally requires the prosecution to bear the burden of demonstrating to the court that there was no

prejudice inherent in the violation of defendant's rights, and that the error was harmless beyond a reasonable doubt. Id. at 24. Cf. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968); Beasley v. United States, 491 F.2d 687, 689-690, 696 (6th Cir. 1974).

Neither this court's recent decision in United States v. Morrison, 449 U.S. 361 (1981) nor its earlier decision in Chambers v. Maroney, 399 U.S. 42 (1970), dictate a contrary result. While extensive discussion of a prejudice requirement was included in Morrison, the entire focus of the opinion was not on the alleged ineffectiveness of counsel, but on the propriety of dismissal of the indictment for alleged violation of the Sixth Amendment. Id. at 364, 365. Here, the remedy of the court of appeals, rever-

sal of the conviction and remand for a new trial, was entirely appropriate.

In Chambers, the court specifically distinguished the issue of whether, once counsel was determined to be ineffective, prejudicial results of this ineffectiveness had to be separately demonstrated. Chambers v. Maroney, supra, 399 U.S. at 53. Chambers held only that a mere showing of late appointment was not sufficient to establish that counsel was constitutionally ineffective.

IV

HERE, WHERE COUNSEL WAS FUNDAMENTALLY IMPAIRED BY THE LIMITS OF GOVERNMENTAL COMPENSATION FOR HIS SERVICES, HIS ACCESS TO ESSENTIAL INVESTIGATORY AND EXPERT RESOURCES, HIS OWN INEXPERIENCE, HIS IGNORANCE OF CRIMINAL LAW AND THE CRIMINAL TRIAL, AN INADEQUATE TIME TO PREPARE A DEFENSE, THE GRAVITY AND COMPLEXITY OF THE CHARGES, AND HIS INACCESSIBILITY TO WITNESSES, THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT RESPONDENT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Crime is largely a problem of the poor. Data still shows that the overwhelming majority of criminal prosecutions, sometimes as high as 90% in urban areas, involve legally indigent individuals. Miranda v. Arizona, 348 U.S. 436, 472 n.40 (1966); American Bar Association Standards for Criminal Justice, Providing Defense Services, Standards 5-6.1 to 5-6.3 (1981); ABA Standing Committee on Legal Aid and Indigent Defendants, The Center for

Defense Services: A Draft Discussion Proposal, 4 (February 1978 Draft); Boston University Center for Criminal Justice, Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin, 309-347 (S. Krantz ed. 1976); National Legal Aid and Defender Association, The Other Face of Justice, 83-84 (1973). Despite this fact, evidence also shows that the indigent defense component of the criminal justice system receives only 1.5% of all state and local expenditures in the criminal justice system, as contrasted with 5.9% for prosecution, 13.1% for courts, 53.2% for police and 24.7% for corrections. Lefstein, Criminal Defense Services for the Poor, 10 (ABA Standing Committee on Legal Aid and Indigent Defendants, 1982), quoting, Bureau of Justice Statistics, U.S.

Department of Justice, 1980 Sourcebook of Criminal Justice Statistics (1981); see also, Wilson, "Empty-Handed Justice," 22 The Judge's Journal 20 (Winter 1983). This tragic and unjustified imbalance in allocation of resources, in and of itself, threatens the core of the adversary system and denies fundamental fairness to the impoverished criminal defendant.

The close review of convictions on direct appeal or by collateral attack actually offers the prospect of long-term money savings. Now, because of the reversal of criminal convictions due largely to appointed counsel's ineffectiveness, costly new trials and appeals occur. The adoption of articulate and strictly enforced standards on review would result in greater realization by government of

the savings occasioned by provision of adequate indigent defense resources at the outset.

Here, Mr. Cronic's counsel was appointed pursuant to the provisions of the Criminal Justice Act of 1964, 18 U.S.C. Sec. 3006A (hereafter CJA). His appointment was approved pursuant to a plan adopted by the U.S. District Court for the Western District of Oklahoma. Misc. No. 22, Plan, United States District Court for the Western District of Oklahoma, (Approved, Feb. 27, 198)1. Both the Oklahoma plan and the fees currently available under the CJA are demonstrative of the pitiful attention and resources allocated to the defense function, a factor in the systemic impairment of counsel which must not be ignored by this Court.

The Oklahoma plan is so lacking in specificity as to leave virtual unbridled discretion for appointment of counsel in the hands of the trial judge. It permits the recruitment of the proverbial "warm body" for criminal representation in the federal court, much as defendant's trial counsel proved to be. Had the plan adopted: (1) controls for placement on and removal from the appointment panel, (2) independent screening of panel candidates by a neutral body, and (3) specific practice requirements or performance criteria, this case would never have arisen. Other jurisdictions have proposed or adopted plans that address each of these problems. See, e.g. Federal Judicial Council, CJA Committee, Model Plan for the Composition,

Administration, and Management of the Panel of Private Attorneys Under the Criminal Justice Act; No. 1426 Misc., Plan for the Appointment of Counsel and Other Services Pursuant to the Criminal Justice Act of 1964, As Amended (U.S. District Court for District of N.M., Approved, Oct. 19, 1980); District of Columbia Criminal Justice Act Plan, supra, at 43.

Moreover, payment of attorney's fees under the CJA was and is limited to $20.00 per hour for out-of-court work and $30.00 per hour for in-court, with a $1,000 maximum for felony representation, subject to fees in excess of the maximum on approval of the Chief Judge of the Circuit. 18 U.S.C. 3006A(d). Payment for expert witnesses and investigative

services is limited to a total of $300.00 under 18 U.S.C. 3006A(e)(3).

Limitation of fees in this fashion, particularly on the complex facts of this case, is unconscionable.[18] Those few who

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[18] This very same fee structure recently gave rise to a refusal by appointed lawyers in the District of Columbia to accept further cases without an increase in compensation. The attorneys asserted that the low fees resulted directly in their inability to deliver competent representation to the poor. "After 12 Years Without an Hourly Rate Rise, D.C.'s Court Appointed Lawyers Go on Strike," National Law Journal, Sept. 19, 1983.

While legislation is now pending which would amend the fee levels (H.R. 3233) critics have, for some time, asserted the inadequacy of CJA fees and their impact on quality. Cf. Bazelon, "The Realities of Gideon and Argersinger," 64 Geo. L. Rev. 811-838 (1976); Note, "Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster," 93 Harv. L. Rev. 752, 776-780 (1980).

accept, willingly or unwillingly, the obligation to represent the indigent in vindication of the constitutional right for all citizens to counsel should not have to bear the disproportionate burden of cost in such cases. When the prosecution was here equipped to investigate and develop its case over a three year period, and with resources far beyond those of the already well-funded U.S. Attorney's office. This disparity goes far toward explaining defense counsel's ineffectiveness below. One of the principle benefits which would accrue from affirmance would predictably be the provision of resources necessary to make the Fifth, Sixth and Fourteenth Amendment guarantees more than a mere form of words.

CONCLUSION

The Tenth Circuit Court of Appeals correctly reversed the conviction of the defendant based on the cumulative errors which resulted in his denial of effective assistance of counsel. The decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

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Counsel of Record

Appendix A

REPORTED FEDERAL AND STATE APPELLATE DECISIONS REVERSING CONVICTIONS ON GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

January 1970 - July 1982

Federal Courts of Appeal*

Washington v. Maroney, 428 F.2d 10 (3d Cir. 1970) (late appointment and resulting trial errors)

Audry v. Henderson, 429 F.2d 26 (5th Cir. 1970) (counsel did not advise defendant of right to appeal)

Thomas v. Beto, 423 F.2d 642 (5th Cir. 1970) (failure to advise of right to appeal)

United States v. Hammonds, 425 F.2d 597 (D.C. Cir. 1970) (general ineffectiveness)

Matthews v. United States, 449 F.2d 985 (D.C. Cir. 1971) (casual summation) (reversed on other grounds)

Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972) (failure to file motion to suppress and ill-advised cross-examination)

Cooks v. United States, 461 F.2d 530 (5th Cir. 1972) (erroneously informing defendant that if he did not plead guilty he might be subject to a sentence six times greater than possible)

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* By year and by Circuit within years.

Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (counsel did not investigate defendant's only defense)

Fitzgerald v. Beto, 479 F.2d 420 (5th Cir. 1973) (counsel failed to communicate dead offer from prosecutor to defendant)

Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973) (failure to assist defendant as to entry of guilty plea)

Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) (inadequate preparation when lawyer appointed on day of trial, resulting in ineffective advice)

Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974) (over defendant's protestations, counsel informed jury of deal and allowed conviction without any production of evidence)

United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974) (failure to pursue a successful motion for a court-appointed psychiatrist)

McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974) (counsel failed to do any investigation other than to interview defendant)

Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975) (failure to request delay to investigate)

Garza v. Wolff, 528 F.2d 208 (8th Cir. 1975) (counsel failed to call each expert witness and to investigate a police report)

United States v. Fessel, (5th Cir. 1976) (failure to move for a court-appointed psychiatrist)

Thomas v. Wright, 535 F.2d 407 (8th Cir. 1976) (counsel failed to interview any witnesses because of general policy against doing so, because of fear of bribery accusation)

United States v. Easter, 539 F.2d 663, (8th Cir. 1976) (failure to challenge search)

Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) (ineffectiveness at vior dire and in challenging testimony)

United States ex.rel Healey v. Cannon, 553 F.2d 1052 (7th Cir. 1977) (counsel gave defendant "grossly deficient" advice concerning guilty plea)

United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978) (trial counsel offered certain references to prior convictions into evidence)

Boyer v. Patton, 579 F.2d 284 (3rd Cir. 1978) (counsel failed to object to certain testimony)

Proffitt v. United States, 582 F.2d 854 (4th Cir. 1978) (counsel conditioned investigation and presentation of insanity defense on payment of lawyer's fee and expert witness expenses)

Bonds v. Wainwright, 564 F.2d 1125 (5th Cir. 1978) (ineffective in helping defendant decide whether to pursue direct appeal)

Canary v. Bland, 583 F.2d 887 (6th Cir. 1978) (inadvertent failure to challenge use of a prior conviction in a habitual criminal charge)

Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979) (failure to investigate insanity defense)

Brown v. Blackburn, 625 F.2d 35 (5th Cir. 1980) (failure to investigate)

United States v. Porterfield, 624 F.2d 122 (10th Cir. 1980) (failure to investigate)

Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981) (failure to investigate)

Wiley v. Sanders, 647 F.2d 642 (6th Cir. 1981) (in closing arguments, defense attorneys repeatedly referred to defendant as "guilty")

Ford v. Parratt, 638 F.2d 1115 (8th Cir. 1981) (failure to investigate a significant issue)

United States v. Baynes, 687 F.2d 659 (3d Cir. 1982) (failure to listen to exemplar of defendant's voice and compare it to government tape)

Uptain v. United States, 692 F.2d 8 (5th Cir. 1982) (counsel was at same time chief prosecution witness in defendant's bail-jumping trial)

Harris v. Housewright, 697 F.2d 202 (8th Cir. 1982) (general ineffectiveness)

Hollis v. United States, 687 F.2d 257 (8th Cir. 1982) (failure to file timely notice of appeal)

Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) (lack of thorough investigation deprived defendant of a defense and counsel failed to perceive a credible challenge of the grand jury) (death penalty case)

United States v. Rumery, 698 F.2d 764 (5th Cir. 1983) (counsel erroneously advised defendant of maximum sentence causing defendant to enter guilty plea to avoid that false sentence)

Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983) (ineffectiveness caused by the State)

State High Courts and Courts of Appeal*

State v. Watson, 134 Ariz.L., 653 P.2d 351 (1982) (failure to request a hearing on identification procedures, considering evidence)

State v. Jackson, 534 P.2d 281 (Ariz. App. 1975) (late appointment)

Clark v. State, 274 Ark. 81, 621 S.W. 2d 857 (1981) (failure to file motion to dismiss for speedy trial violation)

Irons v. State, 267 Ark. 469, 591 S.W. 2d 650 (1980) (ineffectiveness involving guilty plea)

In re Saunders, 2 Cal. 3d 1033 (1970) (failure to undertake careful investigation deprived defendant of possible defense) (death penalty case)

In re Smith, 3 Cal. 3d 192 (1970) (failure of appellate counsel to raise crucial assignments of error)

In re Banks, 4 Cal. 3d 337 (1971) (failure to argue crucial issues on appeal)

People v. Shells, 4 Cal. 3d 626 (1971) (bad trial strategy based on poor investigation)

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* Alphabetically, by state, and by year within State.

People v. Rhoden, 6 Cal. 3d 519 (1972) (appellate counsel failed to raise crucial issues)

People v. Belcher, 11 Cal. 3d 91, (1974) (failure to advise defendant to enter proper plea)

In re Greenfield, 111 Cal. App. 3d 536 (1970) (failure to investigate easily discoverable case law)

In re Scruggs, 15 Cal. App. 3d 290 (1971) (incorrect plea entered on advice of counsel)

In re Kubler, 53 Cal. App. 3d 799 (1975) failure to enter proper plea, considering known evidence)

People v. Zimmerman, 102 Cal. App. 3d 647 (1980) (miscellaneous trial errors)

In re Cassandra R., 139 Cal. App. 3d 670 (1983) (counsel was totally unprepared at trial)

People v. Herrera, 188 Colo. 402, 534 P.2d 1199 (1975) (failure to research question)

People v. Moreland, 193 Colo. 237, 567 P.2d 355 (1977) (case proceeded to trial immediately following appointment of substitute counsel)

People v. Blalock, 197 Colo. 320, 592 P.2d 406 (1979) (introduction of damaging testimony)

People v. Gonzales, 37 Colo. App. 8, 543 P.2d 72 (1975) (general ineffectiveness)

Ashell v. United States, 436 A.2d 804 (D.C. 1981) (failure to conduct a full and prompt investigation)

Harris v. United States, 441 A.2d 268 (D.C. 1982) (failure to interview known witnesses or make minimal effort to discover available information)

Dixon v. State, 287 So.2d 698 (Fla. 1973) (defendant persuaded to plead guilty)

Martin v. State, 363 So.2d 403 (Fla. 1978) (failure to adequately prepare)

Castro v. State, 419 So.2d 796 (Fla. 1982) (failure to ascertain whether guilty plea was voluntary)

Holmes v. State, 429 So.2d 279 (Fla. 1983) (at sentencing hearing, ineffectiveness for failure to challenge aggravating circumstances) (death penalty case)

Cannon v. State, 136 Ga. App. 479 (1975) (different counsel only for arraignment)

People v. Brown, 52 Ill. 2d 227 (1972) (failure of appellate counsel to examine the record of petitioner's trial proceeding)

People v. Carter, 41 Ill. App. 3d 425 (1976) (ineffective tactics and argument)

People v. Lamparter, 56 Ill. App. 3d 823 (1977) (failure to demand new trial on valid issue)

People v. Meacham, 53 Ill. App. 3d 823 (1977) (failure to file timely motion to withdraw guilty plea)

People v. Adams, 71 Ill. App. 3d 138 (1979) (failure to do anything)

People v. Howard, 74 Ill. App. 3d 138 (1979) (failure to fully investigate past psychiatric history)

People v. Lemcke, 80 Ill. App. 3d 298 (1980) (failure to make offer of proof)

People v. Neeley, 90 Ill. App. 3d 76 (1980) (ineffective closing argument and failure to file motion to suppress)

People v. Nicewanner, 93 Ill. 3d 1 (1981) (failure to file timely motion to withdraw guilty plea)

People v. Kronkel, 113 Ill. App. 3d 992 (1983) (failure to investigate alibi witness)

Hartman v. State, 155 Ind. App. 199, 292 N.E. 2d 293 (1973) (counsel had virtually no time to prepare)

Jones v. State, 175 Ind. App. 343, 371 N.E. 2d 1314 (1978) (public defender given only 3 hours to consult with defendant, after retained counsel withdrew)

Blankenship v. Commonwealth, 554 S.W. 2d 898 (Ky. App. 1977) (failure to timely file appellate record)

State v. Myles, 389 So.2d 12 (La. 1980) (ineffectiveness at sentencing hearing at which no evidence was introduced) (death penalty case)

People v. Strodder, 394 Mich. 193 (1975) (general ineffectiveness and abusive treatment of court)

People v. Morris, 30 Mich. App. 169 (1971) (miscellaneous acts)

People v. Husband, 50 Mich. App. 46 (1973) (refusal by counsel to participate after not getting a continuance)

People v. Bryant, 77 Mich. App. 108 (1977) (failure to prepare an insanity defense which he had announced an intention to do)

People v. McDonnell, 91 Mich. App. 458 (1979) (failure by counsel to prepare an insanity defense of which he was aware)

People v. Snyder, 108 Mich. App. 754 (1981) (failure to obtain opinion on witness)

Hall v. State, 496 S.W. 2d 30 (Mo. 1973) (sole effort was plea bargain attempt)

Thomas v. State, 516 S.W. 2d 761 (Mo. 1974) (failure to investigate alibi)

State v. Moon, 602 S.W. 2d 828 (Mo. 1980) (failure to know plea entered)

Parcel v. State, 637 S.W. 2d 440 (Mo. 1982) (failure to ascertain from defendant whether there was a factual basis for his claimed relief)

Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981) (appellate counsel argued his petition was frivolous)

New Jersey v. Anderson, 117 N.J. Super. 507 (1971) (counsel was totally unprepared)

State v. Marrero, 155 N.J. Super. 567 (1978) (failure to make motion for pre-trial diversion of defendant)

New York v. Bennett, 29 N.Y. 2d 462 (1972) (complete lack of investigation or preparation)

People v. Labree, 34 N.Y. 2d 257 (1974) (general ineffectiveness)

New York v. Droz, 39 N.Y. 2d 457 (1976) (little or no effort to prepare)

New York v. Brown, 45 N.Y. 2d 852 (1978) (failure, among other things, to prepare)

New York v. Gonzalez, 47 N.Y. 2d 606 (1979) (filed appellate brief which made no arguments)

People v. Baldi, 76 App. Dec. 259 (N.Y. 1980) (general ineffectiveness)

State v. Sinatra, 89 App. Dec. 2d 913 (N.Y. 1982) (failre to raise question of defendant's competency to stand trial)

State v. Schelling, 92 App. Dec. 2d 694 (N.Y. 1983) (general ineffectiveness)

People v. Gonzalez, 43 App. Div. 2d 914 (N.Y., 1974) (failure to assist defendant at sentencing)

Carroll v. Cupp, 40 Or. App. 773, 621 P.2d 72 (1980) (ineffectiveness at sentencing)

Norton v. Cupp, 54 Or. App. 897, 636 P.2d 468 (1981) (failure of counsel to file a timely notice of appeal)

Shipley v. Cupp, 54 Or. App. 283, 650 P.2d 1032 (1982) (failure of appellate counsel to argue valid issue)

Commonwealth v. Wideman, 453 Pa. 119 (1973) (course chosen by counsel had no reasonable basis designed to effectuate defendant's interests)

Commonwealth v. Bronson, 457 Pa. 66 (1974) (failure to pursue alibi defense)

Commonwealth v. Adams, 465 Pa. 314 (1976) (failure to call corroborating witness)

Commonwealth v. Hillman, 465 Pa. 541 (1976) (failure of counsel to request time to investigate a questionable line-up identification)

Commonwealth v. Holmes, 468 Pa. 409 (1976) (failure to file a direct appeal on a valid issue)

Commonwealth v. Mabie, 467 Pa. 464 (1976) (failure to investigate defendant's contentions)

Commonwealth v. Ramos, 468 Pa. 404 (1976) (failure to explain charges or elements of crime)

Commonwealth v. Humphrey, 473 Pa. 533, 375 A.2d 717 (1977) (failure to object to references to defendant's exercising of right to remain silent)

Commonwealth v. Gaston, 474 Pa. 218, 378 A.2d 297 (1978) (failure to file motion to suppress)

Commonwealth v. Bailey, 480 Pa. 329, 390 A.2d 166 (1978) (failure to raise valid issue)

Commonwealth v. Smith, 478 Pa. 76, 385 A.2d 388 (1979) (appellate counsel ineffective for failing to raise valid issue)

Commonwealth v. Yocham, 483 Pa. 478, 397 A.2d 766 (1979) (failure to raise, on appeal, challenge to Commonwealth's showing at suppression hearing)

Commonwealth v. Hare, 486 Pa. 123, 404 A.2d 388 (1979) (appellate counsel ineffective for failing to raise valid issue)

Commonwealth v. von Smith, 486 Pa. 564, 406 A.2d 1034 (1979) (untimely request for severance)

Commonwealth v. Anderson, 490 Pa. 225, 415 A.2d 887 (1980) (failure to object to prosecutor's summation)

Commonwealth v. Brown, 496 Pa. 86, 436 A.2d 165 (1981) (counsel failed to object to prejudicial remarks)

Commonwealth v. Fassett, 496 Pa. 529, 437 A.2d 1166 (1981) (counsel failed to move for suppression of evidence)

Commonwealth v. Smith, 495 Pa. 362, 433 A.2d 1349 (1981) (failure to make a timely motion to sever the trial)

Commonwealth v. Boston, 242 Pa. Super. 98, 363 A.2d 1178 (1976) (failure to cross-examine main witness)

Commonwealth v. McCutchen, 245 Pa. Super. 56, 369 A.2d 291 (1976) (failure to appeal on valid issue)

Commonwealth v. Washington, 239 Pa. Super. 336 (1976) (failure to investigate and file notice of alibi)

Commonwealth v. Bable, 248 Pa. Super. 496, 375 A.2d 350 (1976) (failure to take direct appeal on valid issue)

Commonwealth v. Byrd, 250 Pa. Super. 250, 378 A.2d 921 (1977) (failure to file motion to dismiss on valid issue)

Commonwealth v. Griffith, 249 Pa. Super. 252, 376 A.2d 253 (1977) (failure to move to quash invalid indictments)

Commonwealth v. Gasper, 262 Pa. Super. 141, 396 A.2d 685 (1978) (decision to cross-examine on arguably illegal confession rather than moving to suppress)

Commonwealth v. McNeal, 261 Pa. Super. 332, 396 A.2d 424 (1978) (failure to preserve valid issue)

Commonwealth v. Davis, 267 Pa. Super. 118, 406 A.2d 547 (1979) (failure to ensure defendant understood charges)

Commonwealth v. Vasquez, 268 Pa. Super. 295, 408 A.2d 154 (1979) (failure to be aware of time requirements for filing a motion)

Commonwealth v. Allen, 278 Pa. Super. 501, 420 A.2d 653 (1980) (failure to ensure that defendant's guilty plea was voluntary)

Commonwealth v. Austin, 274 Pa. Super, 1, 417 A.2d 1220 (1980) (failure to object to charge)

Commonwealth v. Johnson, 280 Pa. Super. 309, 421 A.2d 737 (1980) (failure to file post-trial motion)

Commonwealth v. Wetzel, 276 Pa. Super. 445, 419 A.2d 541 (1980) (repeated reference to prior criminal activity)

Commonwealth v. Smith, 297 Pa. Super. 63, 443 A.2d 299 (1982) (failure to raise improper pre-trial waiver colloquy)

Commonwealth v. Stitzel, 454 A.2d 1072 (Pa. Super. 1982) (failure to challenge juror)

Commonwealth v. Tran, 453 A.2d 993 (Pa. Super. 1982) (failure to object to omitted charge)

Commonwealth v. White, 450 A.2d 63 (Pa. Super. 1982) (failure to find, interview, and call certain witnesses)

Commonwealth v. Williams, 297 Pa. Super. 138, 443 A.2d 338 (1982) (stipulation of crucial testimony)

Commonwealth v. Taliaferro, 455 A.2d 694 (Pa. Super. 1983) (failure to object to prejudicial irrelevant evidence)

State v. McBride, 296 N.W. 2d 551 (S.D. 1980) (miscellaneous)

Grooms v. State, 320 N.W. 2d 149 (S.D. 1982) (failure to make timely appeal)

McKeldin v. State, 516 S.W. 2d 82 (Tenn. 1974) (defendant was represented by someone masquerading as a lawyer)

Prince v. State, 500 S.W. 2d 533 (Texas 1973) (counsel appointed on day of trial)

Ex parte Cavett, 521 S.W. 2d 619 (Texas 1975) (alibi witnesses not subpoenaed)

Flores v. State, 576 S.W. 2d 632 (Texas 1978) (failure to investigate)

Cude v. State, 588 S.W. 2d 895 (Texas 1979) (failure to object to numerous prejudicial matters)

Miles v. State, 644 S.W. 2d 23 (Texas 1982) (general ineffectiveness)

Weathersby v. State, 627 S.W. 2d 729 (Texas 1982) (failure to object to inadmissible testimony)

Brewer v. State, 649 S.W. 2d 628 (Texas 1983) (improper statements by counsel as to tape recording of pre-trial consultation)

State v. Ernest, 94 Wash. 2d 839, 621 P.2d 121 (1980) (failure to interview witnesses)

State v. Jury, 19 Wash. App. 256, 576 P.2d 1302 (1978) (failure to conduct adequate investigation)

State v. Thomas, 157 W.Va. 640, 203 S.E. 2d 445 (1974) (miscellaneous trial errors)

Cannellas v. McKenzie, 236 S.E. 2d 327 (W.Va. 1977) (miscellaneous trial errors)

State v. Pelfry, 256 S.E. 2d 438 (W.Va. 1979) (failure to move for a mistrial solely for economic reasons)

State v. Bias, 301 S.E. 2d 776 (W.Va. 1983) (failure to utilize overwhelming evidence of defendant's insanity) (death penalty case)

State v. Felton, 110 Wis. 2d 485, 329 N.W. 2d 161 (1983) (failure to learn relevant law and failure to investigate)